Supreme Court, U.S.
FILED
041735 JUN 22 2005
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

SOUTHERN OREGON BARTER FAIR,

Petitioner,

v.

STATE OF OREGON,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BRIAN MICHAELS
BRIAN MICHAELS, PC
259 East Fifth Avenue
Suite 300-D
Eugene, OR 97401-2677
(541) 687-0578

Counsel for Petitioner

194996

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Did this Court intend by its decision in *Thomas v. Chicago Park Dist.*, 122 S. Ct. 775, 534 U.S. 316, 151 L. Ed. 2d 783 (2002), to eliminate the requirement for a timely administrative review of Application for Permit, when the licensing scheme is content neutral?

PARTIES TO PROCEEDING

Petitioner is Southern Oregon Barter Fair, Inc.

Respondent is the State of Oregon.

In addition to these parties, the following were parties to the proceedings below:

JACKSON COUNTY,
JACKSON COUNTY COMMISSIONERS,
JACKSON COUNTY SHERIFF,

and as individuals:

RIC HOLT,
JACK WALKER,
SUE KUPILLAS,
and ROBERT KENNEDY.

RULE 29.6 STATEMENT

Southern Oregon Barter Fair is a 501(c)(3), nonprofit corporation, organized and existing under the laws of the State of Oregon. The corporation's primary purpose and activity is to organize and host an annual public gathering and festival dedicated to the cultural and religious integrity of natural peoples everywhere. The principle office is located at 1130 Tetherow Road, Williams, OR 97544.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO PROCEEDING	ii
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
TABLE OF APPENDICES	vii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
RELEVANT STATUTORY AND CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
A. THE ANNUAL SOUTHERN OREGON BARTER FAIR AND JACKSON COUNTY	2
B. PROCEEDINGS BELOW	3

Contents

	Page
REASONS FOR GRANTING THE PETITION . . .	4
1. CONFLICT WITH THIS COURT'S HOLDING IN *THOMAS*	4
2. CONFLICT WITH OTHER CIRCUITS	8
CONCLUSION	12

TABLE OF CITED AUTHORITIES

CASES *Page*

American Civil Liberties Union of Nevada v. City of Las Vegas, 333 F.3d 1092 (9th Cir. 2003) 8

City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C., 124 S. Ct. 2219 (2004) 7-8

Freedman v. Maryland, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965) 8

Lombardo v. Warner, 353 F.3d 774 (9th Cir. 2003) ... 9

New England Reg. Council of Carpenters v. Kinton, 284 F.3d 9 (1st Cir. 2002) 6

Southern Oregon Barter Fair v. Jackson County, Oregon, 401 F.3d 1124 (2005) 2

Southern Oregon Barter Fair v. Jackson County, Oregon, 372 F.3d 1128 (C.A.9 (Or.)) 5

THG Enterprises Inc. v. City of El Cajon, 60 Fed.Appx. 711 (9th Cir. 2003) 9

Thomas v. Chicago Park Dist, 122 S. Ct. 775, 534 U.S. 316, 151 L. Ed. 2d 783 (2002) .....*passim*

Cited Authorities

Page

UNITED STATES CONSTITUTION

First Amendment 1, 4

STATUTES

28 U.S.C. § 1254(1) 1

Oregon Mass Gathering Act 1

ORS 433.735 to 433.770 1

ORS 433.990(6) 1

Chicago Ordinance 6

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed June 24, 2004 ..... 1a

Appendix B — Order Of The United States District Court For The District Of Oregon Dated April, 2002 ..... 25a

Appendix C — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Panel Rehearing En Banc Filed July 21, 2004; Published Dissenting Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed March 24, 2005 ..... 64a

Appendix D — Oregon Mass Gathering Act 76a

Petitioner Southern Oregon Barter Fair, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, En banc. The Circuit Court's opinion misinterprets the plain language and meaning of this Court's opinion in *Thomas v. Chicago Park Dist*, 122 S. Ct. 775, 534 U.S. 316, 151 L. Ed. 2d 783 (2002), by eliminating the requirement for timely administration review of application for permit.

OPINIONS BELOW

March 24, 2005 the United State Court of Appeals for the Ninth Circuit denied Petition for rehearing en banc, with a published Dissenting opinion at 401 F.3d 1124 (C.A. 9, 2005). (Pet. App. C.) June 24, 2004, a three-judge panel of the United State Court of Appeals for the Ninth Circuit issued a published opinion, at 372 F.3d 1128 (C.A. 9 (Or.), 2004). (Pet. App. A.)

STATEMENT OF JURISDICTION

Certiorari jurisdiction of this court is invoked in conformity with 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISION INVOLVED

The Oregon Mass Gathering Act, ORS 433.735 to 433.770 and 433.990(6). (Pet. App. D.)

The First Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. THE ANNUAL SOUTHERN OREGON BARTER FAIR AND JACKSON COUNTY

For twelve years preceding the 1996 event, the Southern Oregon Barter Fair was an annual three-day event held on the same private property attracting several thousand participants. In large part due to the difference in social/ cultural life styles, Jackson County, the governing body where the event was held, and the Barter Fair exercised many years of contentious interaction. In 1994, a 'Barter Fair Ordinance' was passed designed to impose limitations and restrictions on the event's procedures. In 1996, the County decided to use the permit system detailed in the Oregon State Mass Gathering Act.

Taken from the Ninth Circuit's En Banc Dissent, *Southern Oregon Barter Fair v. Jackson County, Oregon*, 401 F.3d 1124, 1126-27 (2005), the history of the permit process for 1996 under the Oregon State Mass Gathering Act illustrates the problem with the Ninth Circuit's Opinion, and interpretation of *Thomas*, allowing no deadline for a licensing body to consider an Application for Permit:

> The Fair first requested an application in January 1996. The defendants did not immediately provide an application, explaining that they were in the process of drafting a new ordinance that would require a new application. In April 1996, defendants gave the Fair an application that was identical to the one they had provided the year before. Plaintiff immediately submitted an application, but the defendants did not schedule a hearing on the application until July 22, 1996,

> more than three months after the Fair submitted the permit and more than five months after the Fair had first applied for a permit application. At the July 22 hearing, one defendant-commissioner, expressing his personal disapproval of the lifestyle, beliefs, and practices of the people who would attend the proposed Fair, argued that the Fair's proposed event had no merit and should not be allowed to proceed. Defendants ultimately reached no decision on the application at that hearing, and rescheduled the hearing for more than one month later on August 27, 1996. Finally, more than eight months after the Fair first requested an application, defendants approved the Fair's application on August 29, 1996.

The application was for an event to be held the first weekend in October.

B. PROCEEDINGS BELOW

The 'approval' of the Permit contained so many onerous conditions and restrictions that a federal magistrate issued a Temporary Restraining Order and Preliminary Injunction against enforcement of the Oregon Mass Gathering Act and the Permit. The event went forward and a civil rights action was filed based upon the treatment by Jackson County toward the Barter Fair. After initially declining to intervene, the State of Oregon intervened to defend its statute at Summary Judgment proceedings. The Court, citing *Thomas v. Chicago Park Dist*, 122 S. Ct. 775, 534 U.S. 316, 151 L. Ed. 2d 783 (2002), reversed its earlier Preliminary Injunction and denied the Permanent Injunction against the Mass Gathering Act. The civil rights action proceeded to trial, at which Petitioner prevailed against Jackson County and the Jackson County Sheriff.

After Summary Judgment, but before trial, the action was bifurcated and the portion of the Court's Order upholding the Statute was reduced to Judgment and proceeded to Appeal. The Ninth Circuit considered only the facial challenge to the Oregon Mass Gathering Act.

REASONS FOR GRANTING THE PETITION

1. CONFLICT WITH THIS COURT'S HOLDING IN *THOMAS*

The first and foremost reason why this Writ deserves to be Granted is to prevent any further misunderstanding and misconstruction of this Court's ruling in *Thomas v. Chicago Park Dist*, 122 S. Ct. 775, 534 U.S. 316, 151 L. Ed. 2d 783 (2002). This Court did not say in *Thomas* that a content-neutral time, place, and manner regulation need not include a deadline for administrative review. Indeed, the ordinance in *Thomas* had a twenty-eight day deadline. Yet a majority of the Ninth Circuit's En Banc panel concurred with the three judge panel's conclusion: "The Act need not include either a deadline for consideration by the governing body or a provision for prompt judicial review. *See Thomas*, 534 U.S. at 322-23, 122 S. Ct. 775." 372 F.3d at 1138.

Misapprehension of this core First Amendment protection is anathema, and must be corrected. It is important to note, in this case alone: (a) the trial court (reversing its earlier holding), (b) the three-judge appellate panel, and (c) all but seven of the en banc Court have misconstrued this Court's ruling.